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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

In the Matter of

MARATHON FOUNDRY & MACHINE COMPANY,

Debtor.

JACOB DYNER,

Petitioner,

vs.

JOSEPH SCHWARTZ and FRANCIS J. CURTIS, Trustees of MARATHON FOUNDRY & MACHINE COMPANY, and INTELECTRON, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jacob Dyner, petitioner herein, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 29, 1956.

Opinions Below

The opinion of the Court of Appeals is reported in 239 Fed. 2d 122 and is set forth in full in Appendix A to this petition, infra, p. 7. That opinion affirmed an order entered, without opinion, by the United States District Court of Illinois, Eastern Division, overruling the objections of the petitioner to a Special Master's report and approving the said report.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Northern District of Illinois, Eastern Division, was dated and entered on November 29, 1956. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Questions Presented

Whether in a proceeding under Chapter X of the Bankruptcy Act the principal asset of the debtor may be sold without advertising the sale.

Statutes Involved

The pertinent statutory provision is 11 U. S. C. 516 (3).

Statement of the Case

The principal asset of Marathon Foundry and Machine Company, the debtor in a proceeding for reorganization under Chapter X of the Bankruptcy Act, consisted of 32,126 shares of the capital stock of Bethlehem Foundry and Machine Co. On March 14, 1955, the District Judge entered an order to show cause, directed to all creditors and parties in interest, why those shares should not be sold. This order was published once in the Wall Street Journal, Chicago Journal of Commerce Edition, on March 18, 1955 (R. 141). *The sale of the shares was never advertised.*

On April 25, 1955, the Special Master to whom the cause was referred presided over the bidding. Only three bidders were present (Cause No. 11534, R. 32 et seq.). The highest and successful bid was that of Intelectron, Inc., in the sum of $910,129.58.

From the order of the District Court authorizing the sale to Intelectron, Inc., the debtor appealed to the Court of Appeals for the Seventh Circuit on the sole ground that in a proceeding for reorganization under Chapter X the District Court had no authority to sell the principal asset of the debtor prior to the submission of a plan of reorganization and in the absence of an emergency. The Court of Appeals affirmed, holding that such a sale rested in the trial court's discretion. Thereafter, on April 9, 1956, this Court denied the debtor's petition for certiorari.

On April 20, 1956, Mitchell Continental Corporation filed a petition in the District Court in which it

offered to pay $1,006,507.58 for the said shares, or $96,378.00 more than the bid of Intelectron, Inc. (R. 36). At a hearing on April 23, 1956, Intelectron, Inc., while reserving its rights under the order confirming the sale entered on May 27, 1955, nevertheless orally offered to pay an additional $100,000 for the said shares (R. 66-67).

The motion of Mitchell Continental Corporation was denied, and the proposal of Intelectron, Inc., to increase its bid was disregarded (R. 138). Thereafter on May 7, 1956, the petitioner, Jacob Dyner, the sole stockholder of the debtor, presented a petition to set aside the sale to Intelectron, Inc., and to proceed with a plan of reorganization which provided for payment in full in cash to all creditors (R. 73). A motion for leave to file this petition was referred to a Special Master who heard no evidence but filed a report recommending that the said motion be denied. From the order of the District Judge overruling the exceptions to this report, an appeal was taken to the Court of Appeals for the Seventh Circuit, which on November 29, 1956, affirmed.

REASONS FOR GRANTING WRIT

The right of a district court to sell the principal asset of a debtor under Chapter X without advertising the sale is an important question of federal law which has not been, but should be, settled by this Court.

To effectuate the purposes of General Order in Bankruptcy 18, the District Court below has adopted

Rule 13 (e) in Bankruptcy which reads in part as follows:

> "Unless otherwise ordered by reason of special circumstances, sales shall be by public auction. Unless the Court for cause shown, dispenses with or modifies these requirements or directs a shorter period of advertising, sales shall be advertised at least ten days before the sale and on the day of the sale. . . ."

General Order 52 (2) specifically excludes proceedings under Chapter X from the scope of General Order 18, and it may be surmised that the reason is that Chapter X does not contemplate the liquidation of the principal asset of a debtor but rather the complete rehabilitation of the debtor. Liquidation under Chapter X is ordinarily approved only in the event of a failure of a plan for reorganization.

Section 116 (3) of Chapter X (11 U. S. C. 516 (3)) provides that the District Judge may "authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve. . . ."

The question presented by this petition is simply whether in the light of Section 116 (3) a district judge in the absence of good cause shown, may liquidate a debtor's principal asset without *any* advertising of the sale. It is obvious that more money could have been easily obtained for the Bethlehem

shares had more potential bidders been notified of the sale. The fact that Intelectron, Inc., felt itself constrained at one stage of the proceeding to offer to pay $100,000.00 more is indicative of an uneasy conscience (R. 66, 67).

CONCLUSION

Since the question presented above is important and has never been decided by this Court, the petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH M. HERMAN,
Counsel for Petitioner

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11767 SEPTEMBER TERM AND SESSION, 1956.

In the Matter of

MARATHON FOUNDRY & MACHINE COMPANY,

Debtor.

JACOB DYNER,

Appellant,

v.

JOSEPH SCHWARTZ and FRANCIS J. CURTIS, Trustees of MARATHON FOUNDRY & MACHINE COMPANY, and INTELECTRON, INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

November 29, 1956

Before DUFFY, *Chief Judge*, MAJOR and SCHNACKENBERG, *Circuit Judges*.

MAJOR, *Circuit Judge*. This appeal by Jacob Dyner (sometimes called petitioner) represents the second

challenge in this court to the confirmed sale of 32,126 shares, or approximately 70% of the outstanding stock of Bethlehm Foundry and Machine Company to Intelectron, Inc., the shares being an investment asset of the debtor, Marathon Foundry & Machine Company. The order under attack, both previously and at present, was entered May 27, 1955 (*nunc pro tunc* as of May 9, 1955), in a proceeding under Chapter X of the Bankruptcy Act, and provided for the sale of the Bethlehem stock unless certain enumerated conditions were complied with. There was no compliance, and the court, on July 28, 1955, entered an order directing the trustees to consummate the sale of the Bethlehem stock to Intelectron, Inc. for the sum of $910,129.58, in accordance with its order of May 27 1955.

On a previous appeal by the debtor this court affirmed the order, 228 F. 2d 594. Our opinion in that case contains a rather complete statement of the situation as it existed at that time and in the interest of brevity reference is made thereto. It is pertinent to note that the essential issue decided on that appeal was that the District Court had the power to authorize and approve the sale of the Bethlehem stock to Intelectron and that it did not abuse its discretion in so doing. Application for certiorari was made to the Supreme Court, which was denied. 350 U. S. 1014. Thereupon, this court, on April 17, 1956, directed issuance of its mandate to the District Court.

Petitioner in his brief states the contested issues as follows: "1. Whether a district court in a proceeding under Chapter X of the Bankruptcy Act has the authority to set aside its confirmed sale of an

asset of the debtor because of gross inadequacy of price? 2. Whether a district court in a proceeding under Chapter X of the Bankruptcy Act has the authority to set aside its confirmed sale of an asset of debtor, which asset was worth more than $1,000,000, where there was no advertisement of the sale and the sale price was inadequate? 3. Whether the price at which Bethlehem shares were sold to Intelectron, Inc. was grossly inadequate? 4. Whether the price at which the Bethlehem shares were sold to Intelectron, Inc. was inadequate and whether the failure to advertise the sale contributed to such inadequate price?"

A statement of the proceedings subsequent to our mandate appears to be in order. On April 20, 1956, a petition was filed by Mitchell Continental Corporation (hereinafter referred to as Mitchell), in which it was recited that an offer had been made to the trustees to purchase the Bethlehem stock in controversy at a price of $31.33 per share (a total amount of $1,006,507.58), and that a check in the amount of $50,000 accompanied the offer. The offer of Mitchell was referred to a referee acting as special master and hearings were had thereon.

While this matter was under consideration and on April 23, 1956, a petition was filed with the special master by Jacob Dyner (instant appellant), which contained a detailed recital of previous proceedings and in which it was represented that on February 10, 1956, he entered into an agreement with Thompson-Starrett Co., Inc. (hereinafter referred to as Thompson), by which the latter agreed to make available to the debtor the sum of $1,100,000, to be utilized in connection with other funds in the hands of the trustees

in the payment of all claims against the estate, together with administrative expenses, and that a certified check in the amount of $100,000 accompanied the offer. The petition further recited that inasmuch as the offer might not be sufficient to pay all claims and expenses, Thompson had agreed to increase the amount available to the debtor to $1,300,000. It also was stated in the petition that Thompson agreed to make such amounts available only upon the condition that the Bethlehem shares be sold to Thompson but that the latter withdrew its offer when advised by its counsel that no plan of reorganization could be formulated which would permit the debtor to retain such shares in view of the order of May 27, 1955 (the order under attack). Thereupon, Thompson requested return of its check for $100,000. The petition prayed that the court extend the time for filing a plan of reorganization to May 15, 1956, that in the interim the trustees be restrained from delivering the shares of Bethlehem stock to Intelectron and that upon approval of the plan to be submitted, the court vacate its order of May 27, 1955, authorizing the sale of the Bethlehem stock.

On May 7, 1956, Jacob Dyner filed another petition in which reference was made to the offer by Mitchell to purchase the Bethlehem stock for $1,006,507.58, and stated that at a hearing on the Mitchell petition Intelectron had offered to pay to the trustees, upon delivery of the Bethlehem shares, an additional sum of $100,000, and to waive accrued dividends in the amount of approximately $97,000. The petition stated that Dyner as the owner of all the shares of the debtor desired to present a plan of reorganization (a copy

of which was attached to the petition), which provided for the payment in full of all creditors of the debtor and of the estate, together with the expenses of administration. There was also presented a telegram dated April 23, 1956, from J. N. Doroshaw for Thompson, a copy of which was attached to the petition, which stated, "This will authorize you to deposit with the court our check for one hundred thousand dollars, and we will continue with our agreement with Jacob Dyner to furnish the additional one million dollars, subject to certain minor changes agreed upon with Mr. O. Biller."

The offer of Thompson, as stated in the petition, was to the effect that it would purchase the Bethlehem shares from debtor in exchange for 77,055 of its cumulative convertible preferred stock, and 37,367 shares of its common stock, the said shares to be ascribed a value of $15 for the preferred and $5 for the common. In addition, Thompson proposed to lend the debtor the sum of $1,100,000 in cash, and proposed that a dividend of $3.30 per share be declared on the Bethlehem shares and in the event that no dividend be declared, Thompson would pay to the debtor $106,015.80 in cash. Also the agreement with Thompson provided, so the petition stated, that a claim of Bethlehem against the debtor in the amount of $143,000 would be waived. Petitioner proposed to personally make available $100,000, if required, to pay claims and expenses of administration. Petitioner by adding these various sums comes up with the result that the debtor will be securing $1,841,675 from Thompson subject to the latter's loan of $1,100,000, and predicated thereon states in his petition: "The offer of Thompson-Star-

rett represents more than twice the bid of $910,000 made by Intelectron, Inc. for the Bethlehem shares; and the bid of Intelectron is grossly inadequate and it would be unconscionable to permit the proposed sale of the Bethlehem shares to be concluded with Intelectron, Inc."

Petitioner prayed that the order of May 27, 1955 be set aside, as well as all orders entered subsequent thereto relating to the purported sale of Bethlehem shares, and that the trustees be directed to secure the adoption of the plan of reorganization submitted by petitioner, or, in the alternative, that upon the deposit of such sums as may be required to pay all claims and expenses of administration, the court dismiss the proceedings and return the shares of Bethlehem stock to petitioner. In addition to the telegram and the proposed plan of reorganization already referred to, there was attached to the petition the offer of Mitchell, previously shown, to purchase the Bethlehem shares for the amount of $1,006,507.58. It is significant that the purported agreement with Thompson was not shown or produced. Its existence depends entirely upon the allegations of Dyner's petition, together with any corroboration which may be found in Thompson's uncertain and vague telegram of April 23, 1956.

The hearing on the offer of Mitchell, previously commenced by the special master, was continued after the filing of the two petitions by Dyner, and from then on all petitions were considered by the master. The master in his report to the court recommended that the Mitchell offer be denied, as well as the two motions by Dyner, and that the trustees be instructed to carry out the mandate of the Court of Appeals. Dyner ob-

jected to the report of the special master. After a hearing in which all interested parties were heard or given an opportunity to be heard, the court, on May 18, 1956, entered its order overruling the objections of Dyner and approving the report of the special master. It is from this order that the appeal comes to this court.

Petitioner argues two propositions of law, allegedly supported by cited cases, (1) a confirmed judicial sale may be set aside for gross inadequacy of price and (2) inadequacy of price accompanied with other circumstances having a tendency to cause such inadequacy will justify setting aside a confirmed judicial sale. It is evident that the only difference in the two propositions is that by the second he couples inadequacy of price "with other circumstances." The other circumstances refer to the contention that the sale was inadequately advertised, which resulted in a paucity of bidders. The same cases are cited by petitioner in support of both propositions: *In re Jewett & Sowers Oil Co.*, 86 F. 2d 497, 498; *Slocum et al.* v. *Edwards et al.*, 168 F. 2d 627, 630; *Webster et al.* v. *Barnes Banking Co. et al.*, 113 F. 2d 1003, 1005, and *Graffam* v. *Burgess*, 117 U. S. 180, 191-192. In our view, neither these cases nor any other of which we are aware supports the proposition that a confirmed sale will be set aside for gross inadequacy alone or for gross inadequacy coupled with any other circumstance absent fraud or mistake. In fact, petitioner's counsel in argument to the District Court on his objections to the master's report stated, "This is a very serious issue. I have not been able to find a case on it. I don't think there is a case on it, but I think it is a case which merits much thought and some pioneering."

True, statements may be found in some of the cases, including those relied upon by petitioner, which, standing alone, apparently support his contention; however, it is axiomatic that statements in an opinion must be considered in the light of the issues under consideration in connection with the facts relevant thereto.

Now, a brief comment regarding the cases relied upon by petitioner, as above cited. In the *Jewett* case this court affirmed a decree of the District Court which set aside a confirmed sale but it clearly appeared that the trustee had conveyed by mistake a vastly larger interest than had been offered for sale, and consequently the purchaser received an interest greater than his bid was intended to include. After pointing out this mistake we stated (page 498), "The disproportion between the sale price and the value of the contract sold * * * shocks the conscience of the court," and we cited cases to the effect that "A sale will not be set aside for mere inadequacy of price unless that inadequacy be so gross as to shock the conscience, or unless there be additional circumstances against its fairness." As noted, however, these statements were made in a setting where admittedly a mistake had been made in what was intended to be sold as well as what the purchaser intended to acquire.

A similar situation existed in the *Slocum* case where an order confirming a sale was vacated. The court notes (page 630), "The question then concerns the situation where an order as entered did not express the sale intended by the parties." The court cites *In re Burr Mfg. & Supply Co.*, 217 Fed. 16, 21, in support of the statement that "inadequacy of price so great

as to shock the conscience of the court was ground for vacating a sale already confirmed." The *Burr* case, however, is of no benefit to petitioner. There, the District Court confirmed a judicial sale, set it aside and ordered the property resold to a substantially higher bidder. The Court of Appeals reversed, holding that it was error to set aside the order of confirmation. The court stated (page 21): "Before confirmation, if the inadequacy of the price be great, slight circumstances of unfairness on the part of the party benefited will be sufficient to prevent confirmation, and will justify the opening of the sale for further bids. * * * But the case is different after the sale has been confirmed, and the court below seems to have lost sight of this distinction. After a sale has been confirmed, the court and the successful bidder are regarded as occupying the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties."

In *Webster,* the court does state in effect that a judicial sale may be set aside if the inadequacy in price is so great as to shock the conscience of the Chancellor, providing such inadequacy is accompanied by other circumstances having a tendency to cause such inadequacy or indicating any apparent unfairness or impropriety. In that case, however, a referee made a sale and subsequently set it aside. The action of the referee was confirmed by the court. Moreover and more important, the court was considering a fraudulent sale in which all but the beneficiaries of the fraud were foreclosed from bidding.

The last case cited by petitioner, the *Graffam* case, involved a fraudulent sale and was decided on that basis.

The master, and apparently the District Court, in addition to our previous opinion (228 F. 2d 594), relied upon *J. J. Sugarman Co.* v. *Davis,* 203 F. 2d 931, and *In re Stanley Engineering Corp.,* 164 F. 2d 316. The *Sugarman case,* as here, involved a proceeding for reorganization under Chapter X. A sale to the highest bidder was approved both by the District Court and on review. In so doing the Court of Appeals made the following pertinent observation (page 933): "Where one's bid has been accepted, he has a vested interest which under the decisions may be destroyed only for the most cogent of reasons, such as fraud, or conduct which in effect amounts to fraud. But as has been said many times, the mere fact that someone comes forward and offers to bid more will not be tolerated because it is an invasion of a right acquired by the successful bidder at a free and open sale and for the further and even more weighty reason that permitting this to be done would undermine confidence in judicial sales and thus defeat the end sought to be obtained, the protection of estates being thus liquidated."

In the *Stanley* case the Court of Appeals reversed the District Court, which had refused to confirm a sale to the highest bidder. In doing so the court stated (page 320): "Applying the long-established legal principles enunciated in the cases cited to the facts in the instant case, it is plain that there was no justification for the bankruptcy court's failure to confirm the Galman bid made at the public sale and that

it committed an abuse of discretion in failing to do so." Under the reasoning and result in the *Stanley* case, a reversal in the instant case would be in order if the District Court had refused to confirm the sale to Intelectron, the highest bidder.

Furthermore, even though we accord to petitioner the benefit of statements picked from cases here and there to the effect that a confirmed judicial sale will be set aside for gross inadequacy of price, either in itself or in connection with other circumstances resulting in such inadequacy, they are of no aid to him because there is no factual basis for the application of the principle. It appears to be conceded on all sides that adequacy of price must be determined as of the time of sale. It has been so held. *Morrison et al.* v. *Burnette et al.*, 154 Fed. 617, 625. See also our previous opinion in this matter, page 598.

On the question of the value of Bethlehem shares the District Court found, as disclosed by the previous record in this court, that the shares in controversy had "a fair market value of $775,521.64," or $24.14 per share; also, that Metals Disintegrating Co. had made an offer of $25.00 per share, and that the highest and best bid was that of Intelectron in the total amount of $910,129.58, or $28.33 per share. The court further found that due notice of the sale had been given to all interested persons in accordance with the order of the court and that "it is in the best interests of this estate and the creditors thereof that the benefits attainable by the acceptance of the offer of Intelectron, Inc. be not lost because of the failure of parties herein to propose a fair and equitable plan which will insure, upon approval, acceptance and con-

firmation to the creditors of this estate, at least as great a return as the offer of Intelectron, Inc., will produce."

The finding as to value was based upon evidence conclusive in its nature. The court appointed an appraiser whose qualifications and integrity were not then or now challenged, who testified that the fair market value of the stock was approximately $775,521.64, or $24.14 per share. This expert in evaluation of corporate stock testified in detail as to the factors entering into his evaluation, such as the dividend history, the earning history, the book value and the nature of the industry. At the sale, Metals Disintegrating Co. renewed its bid of $803,150, increased by Intelectron to $867,402. A Mr. Lebensfeld bid $875,433.50, increased by the bid of Intelectron to $900,000. This bid was increased by Lebensfeld to $900,321.26, and again raised by Intelectron to $910,000. No higher bid was received and the stock was sold to Intelectron as the highest and best bidder. In addition, the previous record discloses that these shares were not listed on the Stock Exchange but had been sold shortly before the judicial sale in the over-the-counter market at $15.00 per share. Moreover, the only offer since made to purchase the shares for cash was that by Mitchell Continental Corp. on April 20, 1956 (as above shown) for the sum of $1,006,507.58, as compared with $910,129.58, the price at which they were sold to Intelectron almost a year previously. This increased offer by Mitchell represents only a little more than the dividends which the shares had accumulated since their purchase by Intelectron. This offer by Mitchell, acquiesced in if not sponsored by peti-

tioner, corroborates rather than contradicts the court's finding as to value.

Petitioner stresses the fact that at the hearing before the special master on the Mitchell and Dyner petitions, Intelectron suggested that it would be willing voluntarily to pay an additional $100,000 for the immediate delivery of the Bethlehem shares. This suggestion was made with the express reservation that Intelectron was not waiving any right which it had acquired by reason of its purchase at the judicial sale. It is not apparent how this suggestion could have any bearing upon the value of the shares as fixed by the court almost a year previously. We do not know, of course, the purpose which prompted Intelectron to make this suggestion. Maybe it thought that the shares had increased in value in the meantime and its suggestion was in the interest of fairness. At that time Intelectron had been prevented by litigation from receiving delivery of property which it had purchased at a judicial sale almost a year previously. Its suggestion to pay an additional amount may have been a peace offer, that is, to end the litigation and to acquire possession of property to which it had been entitled since the court's confirmation of the judicial sale. There is no basis for the suggestion that this offer by Intelectron, made with reservation, had any effect upon its legal rights. *In re Stanley Engineering Corp.,* 164 F. 2d 316, 320.

Petitioner's contention in his petition filed May 7, 1956 (above referred to) that he made a bid of more than $1,800,000, borders on the preposterous. In the first place, his offer was not to purchase the shares for that amount or any other. It represented a trading

proposition with a third party, with no firm commitment from the latter. It was a proposal for reorganization which was just as much calculated to produce a gold brick as a gold mine. His request was for leave to submit this speculative and uncertain plan. The court, however, had previously fixed a date by which such plans were to be submitted. This was a limitation period which had long since expired. While we do not question but that the court had authority to permit the filing of Dyner's petition, notwithstanding its previously fixed time limit, it was entirely a discretionary matter.

The court in a colloquy with counsel, after holding that Dyner's petition was without merit, stated, "* * * and if the conscience of the Chancellor should be shocked at anything after a careful review of all of the transactions concerning the sale of this stock, the conscience of the Chancellor should be shocked at your petition." We think that was an appropriate observation.

Another point made by petitioner is that the sale was not adequately advertised. It is not disputed but that the form of notice under the applicable provision (Title 11, Chap. X, Sec. 516) was a discretionary matter with the court. It is argued, however, that more bidders would have been present if the sale had been more widely advertised. That is a matter of conjecture. The notice of sale was given to all interested parties, including creditors and petitioner as the sole stockholder of the debtor, and it was published in one issue of the Wall Street Journal. As stated, the form of the notice is a matter within the discretion of the District Court. *Frank et al.* v. *Drinc-o-Matic, Inc. et*

al., 136 F. 2d 906. Certainly there was no abuse of discretion and we think no basis for the contention that the debtor or anybody else was hurt because of any infirmity in the notice of sale.

Although we are not disposed to do so, we think this appeal could properly be disposed of adversely to petitioner on the basis of our previous decision. Petitioner cannot escape the effect of that decision because there was no issue raised or decided as to the inadequacy of the selling price of the shares, or that there was a deficiency in the notice of sale. The point is that every issue or question which related to the validity of the order under attack could have been raised. It is true that the appeal in that case was by the debtor rather than by Dyner but, at the same time, as the owner of all of the stock of the debtor he was its alter ego. More than that, he was a party to the proceeding below, filed objections to the report confirming the sale and, therefore, had a right to appeal individually from the order or to join the debtor in its appeal.

The court, in *Commissioner* v. *Sunnen,* 333 U. S. 591, 597, referring to the general rule of *res adjudicata,* stated: "The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac,* 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground what-

ever, absent fraud or some other factor invalidating the judgment." This rule, in the same or similar phraseology, has often been applied under a variety of circumstances. See *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 623 (and cases therein cited); *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503 (and cases therein cited), and *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 282.

Assuming, however, that the principle lastly discussed is without application, petitioner is in no better position. This is so for the reason that the finding of the District Court, made on May 27, 1955, as to the fair market value of the shares, that due notice of the sale had been given to all interested parties and that it was in the best interest of the estate that the bid of Intelectron be accepted, are now as binding on this court as if such issues had been raised on the previous appeal. (The record on the previous appeal has by order of court been made a part of the record on this appeal.) Under Rule 52 of the Federal Rules of Civil Procedure, those findings must be accepted unless clearly erroneous. As previously remarked, however, they are supported not merely by substantial evidence, but overwhelmingly.

This contention that the price bid for the shares by Intelectron was grossly inadequate apparently is an afterthought. No such question was raised until after the filing of our mandate in the District Court (almost one year after the sale), and, prior to that time, there was no shocking of conscience either of the court or anyone else. Since that time, nobody's conscience has been shocked except that of petitioner. In fact, the record reveals a high degree of fairness accorded by

the court to petitioner. On numerous occasions the time limit fixed by the court for the proposing of plans was extended at the request of petitioner, and it was only on the last day of the last extension that the debtor appealed from the order of sale. After affirmance by this court petitioner sought a vacation of a confirmed order of sale and leave to file another plan, as uncertain and illusory, no doubt, as those which he had previously proposed. To have granted his request would have turned back the clock on this bankruptcy estate to the point where it commenced.

It is our view that Intelectron as a result of the judicial sale under attack acquired a vested right in the shares of Bethlehem stock which the court under the circumstances was without power to destroy. If we assume, however, that it had such power, it is further our view that granting the relief sought by Dyner would have constituted a clear abuse of discretion.

The order appealed from is

AFFIRMED

SCHNACKENBERG, *Circuit Judge,* concurring.

By his petition, Dyner seeks to set aside the confirmed sale to Intelectron on the ground that it was for a grossly inadequate price. But that ground was not among those urged when Marathon, the debtor, (all of whose stock Dyner owns), objected to the confirmation of the sale. We affirmed an order overruling the stated objections and confirming the sale. *Marathon, etc.* v. *Joseph Schwartz, et al.,* 228 F. 2d, 594. A court of bankruptcy may, in a subsequent proceeding, set aside a confirmed judicial sale, but the general rule is that, if the parties in the subsequent

proceeding are the same as in the prior proceeding in which the confirmation of the same sale was unsuccessfully opposed and an order entered accordingly, the doctrine of *res judicata* applies in the subsequent proceeding. That is true as to all grounds urged against confirmation in the prior proceeding. It is also true as to all grounds which were not but could have been there urged, unless the later proceeding is based on a different cause of action. *Cromwell* v. *Sac County,* 94 U. S. 351, 353, 24 Law ed. 195. Both proceedings now in question were attempts to defeat the sale to Intelectron. They involved the same cause of action, asserted first by filing of objections to confirmation and secondly by presenting a petition to set aside the sale. Undoubtedly a bankruptcy court in the exercise of its equitable powers may set aside a judicial sale on *equitable* grounds, such as fraud, accident or mistake. However, none of these grounds is set forth in Dyner's petition. Even if the petition did charge fraud, that charge is not directed at the purchaser. If gross inadequacy be the basis of the petition, it will not state an equitable cause of action for setting aside the sale unless Intelectron is charged with unfairness or the taking of an undue advantage. *Graffam* v. *Burgess,* 117 U. S. 180, 192, 29 Law ed., 839. Therefore, I conclude that Dyner's petition is a second attempt by the same party to litigate the same cause of action and is barred by *res judicata.*

It is not necessary to decide whether a sufficient charge of fraud against Intelectron, if made in the present proceeding, would constitute a cause of action different from that involved in the prior proceeding. Such fraud is not charged, as above pointed out. If

fraud were properly charged and if thereby a different cause of action were stated, then the rule is that only points actually raised and passed on in the prior proceedings would be binding in the present proceeding as an estoppel by judgment. *Cromwell* v. *Sac County, supra.* It is evident that the referee below based his ruling on the doctrine of *res judicata.* The court stated no grounds for its order. It would have been better if they had permitted the filing of Dyner's petition and had permitted the defense of *res judicata* to be raised by a proper pleading. Instead, Dyner was not permitted to file his petition, and was therefore never in a position to submit evidence as to the merits of the Thompson-Starret offer.

For the reasons herein stated, the order from which this appeal was taken is properly affirmed.

A true Copy:

Teste:

KENNETH J. CARRICK
Clerk of the United States Court of
Appeals for the Seventh Circuit.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Thursday, November 29, 1956

Before:

HON. F. RYAN DUFFY, *Chief Judge,*
HON. J. EARL MAJOR, *Circuit Judge,*
HON. ELMER J. SCHNACKENBERG,
Circuit Judge.

No. 11767

In the Matter of

MARATHON FOUNDRY & MACHINE COMPANY,

Debtor.

JACOB DYNER,

Appellant,

vs.

JOSEPH SCHWARTZ and FRANCIS J. CURTIS, Trustees of MARATHON FOUNDRY & MACHINE COMPANY, and INTELECTRON, INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

This cause came on to be heard on the transcript of the record from the United States District Court

for the Northern District of Illinois, Eastern Division, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order or decree of the said District Court entered on May 18, 1956 in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

Order of Campbell, *U. S. D. J.*

This cause coming on for hearing on the Report of Referee Martin Ward, acting as Special Master, on the disposition of the motions of Mitchell Continental Corporation to enter such orders as may be required to instruct the trustees to accept the Mitchell Continental Corporation offer to purchase certain shares of stock of the Bethlehem Foundry & Machine Company; and the motions of Jacob Dyner for an extension of time to file a plan and for leave to file a certain petition; and the court being fully advised in the premises, and having read the Report of Referee Martin Ward, acting Special Master, on said motions and the recommendations contained therein, and having read and considered the objections filed by Jacob Dyner to said Report and having heard the arguments of counsel in open court;

It Is Hereby Ordered, Adjudged and Decreed that the Report of Referee Martin Ward, acting as Special Master, on motion of Mitchell Continental Corporation, and the motions of Jacob Dyner, be and the same is hereby approved in all respects, and the objections

of Jacob Dyner to said Report of Referee Martin Ward, as Special Master, be and they are hereby overruled.

It Is Further Ordered, Adjudged and Decreed that the motion of Mitchell Continental Corporation to enter such orders as may be required to instruct the trustees to accept petitioner's offer to purchase certain shares of stock in accordance with the prayer of its petitions, be, and the same is hereby denied, and the trustees herein are instructed to carry out the Mandate of the Circuit Court of Appeals affirming the order of May 27, 1955, forthwith.

It Is Further Ordered, Adjudged and Decreed that the motions of Jacob Dyner for an extension of time to file a plan, and the motion for leave to file petitions, dated April 23rd, 1956 and May 7th, 1956, be, and the same are hereby denied.

Enter:

/s/ WILLIAM J. CAMPBELL,
U. S. District Judge.

Dated: Chicago, May 18th, 1956.

Office - Supreme Court, U.S.
FILED
MAR 12 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 805

IN THE MATTER OF
MARATHON FOUNDRY AND MACHINE COMPANY,
DEBTOR.

JACOB DYNER,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY, AND INTELECTRON, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS, JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS S. CLAMITZ,
Attorney for Joseph Schwartz and Francis J. Curtis, Trustees, Respondents.

MANUEL E. COWEN,
MARTIN S. GERBER,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 805.

IN THE MATTER OF

MARATHON FOUNDRY AND MACHINE COMPANY,
DEBTOR.

JACOB DYNER,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY AND MACHINE COMPANY, AND INTELECTRON, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS, JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES, IN OPPOSITION.

OPINION BELOW.

The opinion below is printed in full and in Appendix A, pages 7 to 25 of petition for certiorari.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Where a petition to vacate an order confirming the judicial sale of an investment asset of the debtor in a proceeding under Chapter X of the National Bankruptcy Act, disclosed on its face that said order had been affirmed by the Court of Appeals, and where said petition failed to allege any facts from which fraud, mistake or inadvertence at time of sale could be concluded, but did set forth only those circumstances which had been disposed of in the prior appeal, together with the offer of a higher price for the asset sold, did the District Court err in refusing the appellant leave to file said petition?

STATUTE INVOLVED.

Section 116 (3) of the National Bankruptcy Act; 11 U. S. C. A. 516 (3):

> "Upon the approval of a petition the judge may in addition to the jurisdiction, powers and duties in this chapter conferred * * * (3) authorize a receiver or trustee upon such notice as a judge may prescribe and upon cause shown * * * to sell any property of the debtor real or personal upon such terms and conditions as the judge may approve."

STATEMENT OF FACTS.

The petition represents the second attempt in this court to secure a review and upset the confirmed sale of 32,126 shares, or approximately 70%, of the outstanding stock of Bethlehem Foundry & Machine Company to Intelectron, Inc. The shares were an investment asset of the debtor, Marathon Foundry and Machine Company, and were pledged to secure loans of approximately $525,000.

This matter was commenced by the filing of an involuntary petition in bankruptcy April 30, 1953 (No. 11534,

p. 2). A voluntary petition under Chapter X was thereafter filed on May 20, 1953 (No. 11534, p. 2). After efforts to formulate a plan of reorganization extending over a two year period (No. 11767, p. 9) on May 14, 1955, trustees filed their petition for instructions and the District Court entered its order on all parties to show cause why a bid of approximately $800,000, free and clear of liens, or such higher bid as might be made at the hearing, should not be accepted for the Bethlehem shares which were in the hands of creditors to secure loans to the debtor of approximately $525,000 (No. 11534, p. 13).

The order also required that the secured creditors show cause why they should not be required to turn over to the trustees the Bethlehem shares for the purpose of sale to such bidder; it provided for appraisal of the stock, for service of the order and the petition upon which it was based to all creditors, the stockholder of the debtor, the director of Internal Revenue, and the Securities and Exchange Commission, and for the publication of the order in the Wall Street Journal, and also required earnest money deposits as a condition of bidding at the sale. The publication was accomplished, as required (No. 11767, pp. 139-141).

Pursuant to the order, a hearing and sale of the Bethlehem shares was had before a Special Master on April 25, 1955 (No. 11534, p. 19). It was well attended (No. 11534, p. 35). Petitioner was present in person. A well qualified expert (No. 11534, pp. 21-24) fixed the fair, market value of the stock at $775,521.64 (No. 11534, pp. 26, 107-114). The last sale of the stock in the over-the-counter market, shortly before the judicial sale, had been at $15.00, per share (No. 11534, p. 5). Intelectron, Inc., was the high bidder at the price of $28.33, per share, or a total of $910,129.58, or an amount of $134,607.94 in excess of the appraised value (No. 11534, p. 35). The

acceptance of this bid was urged by the unsecured creditors committee (No. 11534, p. 81). The hearing was then adjourned to afford an opportunity for the presentation of higher bids (No. 11534, p. 46). At two subsequent hearings no higher bids were forthcoming (No. 11534, pp. 75, 76-77).

On May 27, 1955, the District Court entered its order for the sale to Intelectron, Inc., finding that due notice had been given, that the fair, market value of the stock was $775,521.64, that the pledgees had been restrained from selling the stock, and that it was to the best interests of the estate to accept the Intelectron, Inc. bid (No. 11534, pp. 93-95). It was ordered that the trustees sell the stock to Intelectron subject to the condition that the sale not be consummated if an acceptable plan of reorganization, that would assure the estate and the creditors a greater return than that produced by the sale, be presented before May 20, 1955, or that there be deposited before that date a sufficient amount of cash to discharge all debts and costs (No. 11534, pp. 96-99). At the request of the debtor, the time for submitting plans for reorganization was extended several times, ultimately to July 11, 1955 (No. 11767, p. 4; No. 11534, pp. 98, 99). In spite of numerous representations by the debtor and the petitioner here that a plan would be forthcoming to obviate the sale, no such plan was presented. Therefore, on July 28, 1955, the District Court ordered and directed the sale to be consummated (No. 11767, p. 32). No appeal was taken from this order.

On June 24, 1955, debtor appealed from the order of sale of May 27, 1955. The Court of Appeals for the Seventh Circuit affirmed that order on December 22, 1955 (228 F. 2d 594). The opinion of the Court of Appeals for the Seventh Circuit is attached hereto as Appendix A. On February 29, 1956, a petition for certiorari was filed

in this court, which was denied on April 9, 1956 (350 U. S. 1014), and the Court of Appeals' mandate was returned to the District Court on April 17, 1956. Immediately after the return of the mandate, petitioner requested the District Court for leave to file his petition to vacate the confirmed sale. After hearings by a Special Master and the District Court, leave to file the petition to vacate the affirmed order of sale was denied by the District Court by its order of May 18, 1956. Petitioner appealed from that order. On November 29, 1956, the Court of Appeals for the Seventh Circuit affirmed the order of May 18, 1956.

REASON FOR DENYING THE WRIT.

I.

The Question Sought To Be Raised in the Instant Case Has Been Fully and Completely Reviewed in the Prior Appeal Reported at 228 F. 2d 594 (Appendix A hereto), Certiorari Denied 76 S. Ct. 659, and Is Now Res Adjudicata.

Section 116 (3) of the Bankruptcy Act (11 U. S. C. Sec. 516 (3)) provides that the judge may authorize a trustee "upon such notice as the judge may prescribe, and upon cause shown, to * * * sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve".

The meaning of the statute is clear. In plain terms it confers upon the judge power to authorize the sale of *any* asset upon such notice as the judge may prescribe.

Appellant seeks to confuse the court with the theory that notice and advertising are synonymous. They are not. They are separate matters not to be considered together. The notice being authorized by Section 116(3)

of the Bankruptcy Act in the following words of the statute:

"* * * upon such notice as the Judge may prescribe * * *."

We submit we have shown that the notice of sale was proper, effective, and authorized by the governing statutes as herein set forth and as set forth in the opinion in *Marathon Foundry and Machine Company, Debtor* v. *Joseph Schwartz and Francis J. Curtis, Trustees, etc.* (228 F. 2d 594), the prior appeal herein, approving the sale in the instant case as having been proper under the circumstances existing on May 9, 1955 and specifically finding that "proper notice of the sale was given * * *." (Appendix A, pp. vii, viii).

The discretion vested in the District Court by the Statute has been twice reviewed by the Court of Appeals for the Seventh Cricuit (228 F. 2d 594, 239 F. 2d 122). The first of such reviews is *res adjudicata* of the question now presented. *Commissioner* v. *Sunnen*, 333 U. S. 591, 597; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352; *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620, 623; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 282.

II.

The Decision of the Court of Appeals Is Clearly Correct.

The opinion of Judge Major, concurred in by Chief Justice Duffy, and the separate concurring opinion of Judge Schnackenberg, carefully considers the factual background of the case at bar, analyzes the contentions of the appellant, petitioner herein, comments on the efforts of the petitioner to impugn the validity of the previously confirmed and affirmed sale by the presentation of two legally

ill-founded petitions, the granting of which would require the vacating of the confirmed order of sale of the Bethlehem shares.

Judge Major comments that the appeal could be properly disposed of adversely to appellant on the basis of the prior decision 228 F. 2d 596 (appendix hereto), and further comments that petitioner is bound under Rule 52 of the Rules of Civil Procedure by the findings made in the order of May 27, 1955, as to the fair market value of the shares, that due notice of the sale has been given to all parties, and that it was in the best interests of the estate that the bid of Intelectron, Inc. be accepted.

Judge Schnackenberg, concurring, stated that the rule of *res judicata* applies in the second appeal—saying "Therefore, I conclude that Dyner's petition is a second attempt by the same party to litigate the same cause of action and is barred by *res judicata.*" (Petitioner's Brief, Appendix A, p. 24.)

The opinions of the Court of Appeals, having considered the particular facts of this case, and the law applicable, and having found that there was no abuse of discretion by the District Judge on the facts presented, is manifestly correct.

III.

There Is No Important Question of Federal Law.

There is involved no new or important question of Federal Law. The decision below rests upon a sound, accepted application of the law to particular facts in this case. Any other interpretation would disregard the legislative intention to allow a District Court a wide discretion in the handling of proceeding under Chapter X of the Bankruptcy Act. Section 116 (3) of the Bankruptcy Act spells this out so plainly that argument should be unnecessary.

CONCLUSION.

The decision of the Court of Appeals being in conformity with the decisions of this court, and the decisions of other courts of appeals, and no important question of federal law having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS S. CLAMITZ,
Attorney for Joseph Schwartz and Francis J. Curtis, Trustees, Respondents.

MANUEL E. COWEN,
MARTIN S. GERBER,
Of Counsel.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 11534. OCTOBER TERM, 1955—OCTOBER SESSION, 1955.

In the Matter of
Marathon Foundry and Machine Company, a corporation, Debtor.
Marathon Foundry and Machine Company,
Debtor-Appellant,
vs.
Joseph Schwartz and Francis J. Curtis, Trustees of Marathon Foundry & Machine Company, a corporation,
Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 22, 1955.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Debtor has appealed from an order of the district court entered May 27, 1955, directing appellees to sell, for $910,129.58, to Intelectron, Inc. 32,126 shares of the capital stock of Bethlehem Foundry & Machine Co., a Pennsylvania corporation, which stock is an asset of debtor, but which is subject to liens aggregating $500,000 more or less.

An involuntary petition in bankruptcy was filed against debtor on April 30, 1953. Debtor filed its voluntary petition for reorganization under chapter X of the bankruptcy act[1] on May 20, 1953. Said petition was approved as filed in good faith and thereafter appellees were appointed trustees in the reorganization proceedings. In addition to its Bethlehem stock, debtor's assets consisted of a manufacturing plant and equipment at Wausau, Wisconsin[1a], controversial claims against various individuals and indirectly against the United States aggregating about $350,000, and thereafter a fund of approximately $165,000 held by Chicago Title and Trust Company, pursuant to order of court, to insure payment of certain tax and lien claims, and a small amount of cash accumulated by the trustees as a result of the operation of the debtor. The Bethlehem holdings constitute about 70 per cent of Bethlehem's outstanding stock.

On March 14, 1955, the trustees filed a petition in the district court, requesting instructions. At that time no plan of reorganization had been filed. They advised the court that it would be to the best interests of all parties that the Bethlehem stock be sold to the best and highest bidder; that they had no funds with which to redeem the stock, which was held by secured creditors; that such sale would make it possible to pay such secured creditors in full and to realize an additional sum to assure the general creditors a substantial amount, while still leaving the other assets of the debtor to be the subject of a plan of reorganization. The trustees further represented that they had been able to obtain an offer of about $800,000 for said stock, free and clear of any lien.

On March 14, 1955, the district court entered an order

1. 11 U. S. C. A., § 501 *et seq.*

1a. Subject to a lease, expiring April 30, 1957, executed by the trustees pursuant to order of the court below.

that all parties in interest show cause why such sale should not be made. The court by said order also appointed an appraiser to fix the value of the Bethlehem stock, and called for bids.

The district court on April 1, 1955, ordered, *inter alia* that the trsutees should file by July 20, 1955 a plan of reorganization or report their reasons why a plan could not be effected.

On April 22, 1955, the debtor, "by Jacob Dyner," filed written objections to the proposed sale of the Bethlehem stock on the following grounds: (1) no plan of reorganization had been approved, (2) the stock was the principal asset of the debtor and there was no showing of any emergency to justify its sale otherwise than in pursuance of a plan of reorganization, and (3) said sale would make impossible the reorganization of the debtor.

On April 25, 1955 the appraiser fixed the value of the stock at $775,521.64.

Pursuant to notice a referee in bankruptcy, beginning April 25, 1955, heard evidence in support of and against the petition, and on that day bids were received, the highest and best bid being that of Intelectron, Inc., for $910,129.58.

By an amended objection debtor submitted at the adjourned referee's hearing of May 9, 1955 a letter from A. J. Armstrong Co. It was dated April 20, 1955, and addressed to Jacob Dyner who, according to the letter, had represented to Armstrong that he was the sole owner of all outstanding Marathon stock. By this letter Armstrong offered to make a loan to Marathon in a sum not to exceed $975,000, to "be evidenced by a promissory note of Marathon and other instruments and agreements containing such terms, conditions, interest rates and maturity as shall be mutually agreeable to you, Marathon, and

Armstrong." It was conditioned, *inter alia,* on an undertaking by Marathon to pledge its Bethlehem stock on the loan. The letter bore the notation "the foregoing agreement is hereby accepted:" followed by Dyner's signature. Debtor informed the court of a later telegram to Dyner from Armstrong, which said: "Such loan to be made by Armstrong shall be evidenced by a promissory note of Marathon, and by the usual form of loan and security agreement—."

Both the referee and the district court overruled the objections filed by the debtor. By order of May 27, 1955 (entered *nunc pro tunc* as of May 9, 1955), which is the order appealed from, it was provided, *inter alia,* that the said stock should be sold unless (a) suggestions for a plan assuring to the estate and creditors thereof a greater return than the bid of Intelectron, Inc., with security for the consummation thereof, were filed by June 24, 1955[2]; or, (b) there shall have been deposited by May 20, 1955, sufficient funds to discharge all of the debts of the debtor and costs of administration; or (c) the trustees shall have filed by July 20, 1955, their plan of reorganization providing for retention or other disposition of the Bethlehem stock[3]. None of these events has occurred.

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2. This time was extended until July 11, 1955 on motion of the debtor.

3. The order of May 27, 1955 contains findings, including the following:

"That Metals Disintegrating Co., a corporation, has heretofore made an offer to purchase said 32,126 shares of Bethlehem Foundry & Machine Co. stock for $25.00, per share; that said offer was accompanied by an earnest money deposit of $50,000;

That various other competitive bids were made at said hearing, the highest and best bid being that made by Intelectron, Inc., for $28.33, per share, which produced a total offer of $910,129.58; that said offer was made in writing, subject to certain conditions and limits in time for final consummation to September 1st, 1955; that said offer was accompanied by a certified check delivered to the trustees in the sum of $50,000;

The only plan presented was that filed by the trustees on July 20, 1955. Said plan recognized the sale of the 70 per cent interest in Bethlehem to Intelectron, Inc., for the sum of $910,129.58, and provided for the use of the equity derived therefrom, and for the placing of the remainder of the assets of the debtor in a new company to be formed. No court action appears to have been taken on this plan.

On July 28, 1955, the district court entered an order finding that no plan had been filed by any one but the trustees, and again directing the trustees to consummate the sale of Bethlehem stock to Intelectron, Inc. for the sum of $910,129.58, in accordance with the order of May 27, 1955.

Intelectron, Inc. has agreed to extend the date of consummation of the sale until December 31, 1955.

In this court debtor contends: (1) in the absence of an emergency, a bankruptcy court may not order the sale

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That trustees herein have stated, in their opinion, the conditions contained in the offer of Intelectron, Inc., can be fulfilled;

* * * * *

That it appears that the debtor has a substantial equity in said Bethlehem stock which will become available upon sale for either distribution or for a plan of reorganization;

That it is in the best interests of the estate herein that said stock in Bethlehem Foundry & Machine Co. be sold upon the terms and conditions hereinafter set forth to Intelectron, Inc., for the sum of $28.33, per share;

That June 24, 1955 has been fixed as the date by which creditors or stockholders may submit to the trustees suggestions for the formulation of a plan, or proposals in the form of plans;

That it is in the best interests of this estate and the creditors thereof that the benefits attainable by the acceptance of the offer of Intelectron, Inc., be not lost because of the failure of parties herein to propose a fair and equitable plan which will insure, upon approval, acceptance and confirmation to the creditors of this estate, at least as great a return as the offer of Intelectron, Inc., will produce."

of the principal asset of the debtor unless made in pursuance of a plan of reorganization; (2) to authorize such sale, the court must find as a fact based upon evidence that an emergency existed involving imminent danger of loss of the assets if the sale be not consummated; (3) the primary duty for the formation of a plan of reorganization rests with the trustee under chapter X proceedings; and (4) the primary purpose of reorganization proceedings is to effect reorganization of the debtor—not to liquidate its assets.

1. On oral argument before us, debtor's counsel emphatically asserted that the district court lacked power to authorize and approve the sale of the Bethlehem stock to Intelectron.

Included in chapter X, dealing with corporate reorganizations, are several pertinent provisions.

Section 111[4] provides:

> "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Section 126[5] provides:

> "A corporation * * * may * * * file a petition under this chapter."

Section 115[6] provides:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it

4. 11 U. S. C. A., § 511.
5. *Ibid*, § 526.
6. *Ibid*, § 515.

had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

Section 116[7] provides:

"Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—* * * authorize * * * a trustee * * *, upon such notice as the judge may prescribe and upon cause shown, to * * * sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve."

The question of the power of the district court to order the sale must be resolved in the light of the circumstances existing in this case on May 9, 1955. At that time no plan of reorganization of debtor had been submitted to the court by anyone. The Bethlehem stock was owned by debtor but was not used in the conduct of its business, the revenue of which was derived from a factory under lease expiring April 30, 1957. The stock was severally held as collateral security by Louis Dreyfuss, Morris Wolf and Albert J. Grosser Co. We were told upon oral argument by Dreyfuss' counsel that Dreyfuss is entitled to accruing interest at a rate which, his counsel says, is a matter of dispute, either 8 per cent per annum as Dreyfuss contends, or 6 per cent per annum as the trustees contend. On May 9, 1955 the amount due to Dreyfuss was about $220,000, the amount then due Grosser was about $240,000 and the amount due Wolf was about $58,000. The trustees had not sufficient funds with which to redeem the pledged stock.

Under these circumstances, we hold that the district court had power, under the statutory provisions above quoted, to enter the order from which an appeal has been taken. *Frank* v. *Drinc-O-Matic,* 136 F. 2d 906.

7. *Ibid,* § 516.

2. The district court, having power to order the sale of the Bethlehem stock belonging to the debtor, was required to consider the existing circumstances and exercise its discretion as to whether a sale should be ordered and, if so, upon what terms and conditions. In addition to the circumstances hereinbefore set forth, upon which the power of the court to act was based, the following additional facts appear from the record. Debtor had by its petition invoked the jurisdiction of the court in a reorganization proceeding; about two years had elapsed since the filing of that petition, during which time no plan of reorganization had been submitted to the court but during which time heavy interest charges had accrued upon the debtor's loan for which the stock had been pledged; the secured creditors possessed a power of sale of the stock pledged which they were prevented from exercising by the pendency of the reorganization proceeding; proper notice of the proposed sale was given to all persons concerned; no creditor objected; an appraiser appointed by the court fixed the value of the stock at $775,521.64; Metals Disintegrating Co. had made an offer amounting to $803,150; Intelectron, Inc. had made a bid for the stock in the sum of $910,129.58 in cash; neither debtor nor Dyner, its sole stockholder, had made any bid; and the sale, if consummated at the price bid by Intelectron, would pay the secured creditors in full and leave a substantial balance for expenses of administration and general creditors.

In view of these circumstances the district court, in the exercise of its discretion, authorized the sale. We are not at liberty to substitute our discretion for that of the district court. *Frank* v. *Drinc-O-Matic, supra.* We should reverse the order appealed from only if we are satisfied that the court in entering it was guilty of an abuse of discretion.

The burden is on the debtor to establish an abuse of discretion. *Kimmel* v. *Crocker,* 72 F. 2d 599, at 601. It relies heavily upon the so-called Armstrong offer, contained in a letter to Dyner submitted at the referee's hearing of May 9, 1955. This letter suggested a loan by Armstrong to Marathon but required that it be evidenced by the debtor's note "and other instruments and agreements containing such terms, conditions, interest rates and maturity as shall be mutually agreeable to you, Marathon, and Armstrong." It will be noted that not only is the nature of the "other instruments and agreements" left undefined, but also that the letter leaves unsettled such vital essentials as the terms, conditions, interest rates and maturity, postponing such matters to subsequent agreements, if any, among Dyner, debtor and Armstrong. Whether or not there would ever be a meeting of the minds on these important matters was on May 9, 1955 uncertain. Moreover, in a period of over two years in which the debtor's property and business had been in the bankruptcy court, this was the only suggestion which either it or Dyner had submitted to the court for ending the proceedings there. Debtor's counsel, although apparently imbued with a belief in the efficacy of the Armstrong offer, in this court characterized it rather weakly as "an offer of a loan which might have had the effect of allowing the debtor to continue as a going concern."

In view of these facts, we cannot find that the district court was guilty of an abuse of discretion in ordering that the sale to Intelectron be consummated.

For the reasons hereinbefore set forth, the order from which an appeal has been taken is

AFFIRMED.

Office - Supreme Court, U.S.
FILED
MAR 12 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 805

IN THE MATTER OF
MARATHON FOUNDRY & MACHINE COMPANY,
DEBTOR.

JACOB DYNER,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY & MACHINE COMPANY, AND INTELECTRON, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT INTELECTRON, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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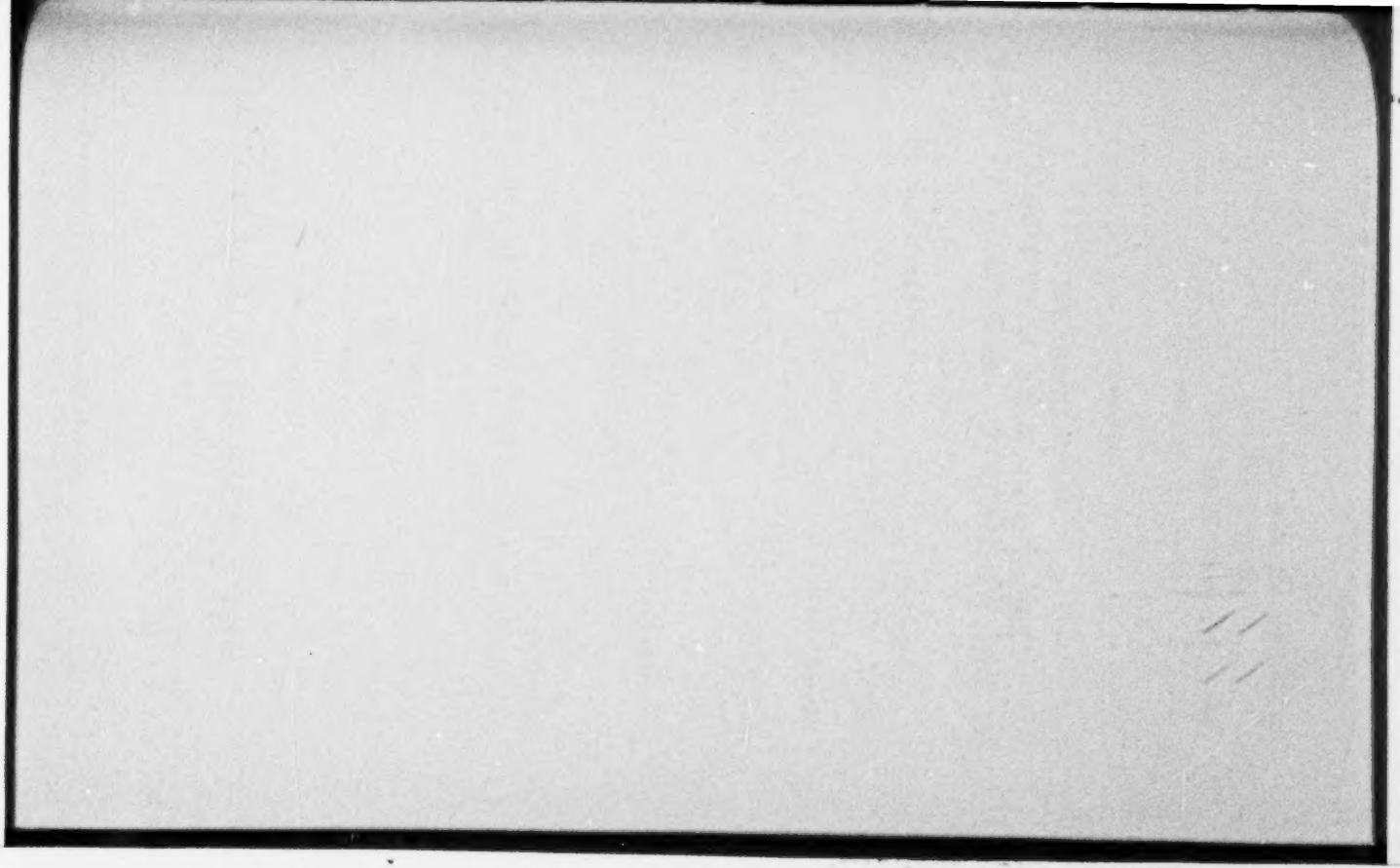

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 805.

IN THE MATTER OF
MARATHON FOUNDRY & MACHINE COMPANY,
DEBTOR.

JACOB DYNER,
Petitioner,

vs.

JOSEPH SCHWARTZ AND FRANCIS J. CURTIS, TRUSTEES OF MARATHON FOUNDRY & MACHINE COMPANY, AND INTELECTRON, INC.,
Respondents.

BRIEF OF RESPONDENT INTELECTRON, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioner challenges the validity of a judicial sale. Its subject was 32,126 shares, or approximately 70%, of the outstanding stock of Bethlehem Foundry & Machine Company. The shares were an investment asset of the Debtor. Petitioner is the sole stockholder of the Debtor.

The sale was held by a Special Master (No. 11767, p. 106). Notice was given to all parties (No. 11534, p. 93). The order directing the sale was published in the Wall Street Journal (No. 11767, p. 139). This Respondent was the high bidder and its bid was accepted (No. 11534, p. 94).

The District Court confirmed the sale, the Court of Appeals affirmed (228 F. 2d 594) and this Court denied certiorari (350 U. S. 1014). On return of the mandate, Petitioner sought leave to file a petition seeking to vacate the sale (No. 11767, p. 73). Leave to file the petition was denied (No. 11767, p. 138). Another appeal was taken from that denial. The Court of Appeals again affirmed (239 F. 2d 122). The petition at bar followed.

ARGUMENT.

The stock involved was pledged to creditors to secure a loan to Debtor (No. 11534, p. 55). Approximately two years had elapsed without formulation of a reorganization plan, during which time the secured creditors had been restrained from disposing of their collateral. The Trustees then petitioned for the sale and proposed a reorganization dependent on it (No. 11534, p. 4; No. 11767, p. 5).

Debtor and Petitioner were present at all hearings before the Special Master and the District Court involving the sale and its confirmation. They did not object to the adequacy of the notice of sale until after it had been confirmed and affirmed (No. 11767, p. 155).

Petitioner now questions the right of a court in a Chapter X proceeding to order a sale of "the principal asset of the debtor • • • without advertising."

The record shows that one of the principal assets is a factory and 200 items of heavy foundry and metal working machinery (No. 11534, pp. 49, 52). The shares of stock in question were merely an investment asset.

The sale was advertised by notice to all parties and by publication of the order directing it in the Wall Street Journal.

The applicable statute provides (U. S. C., Title 11, Chap. X, Sec. 516(3)) that the court may authorize a sale of "any property" and "upon such notice as the judge may prescribe." As the Court of Appeals stated (239 F. 2d 122, 128), "It is not disputed but that the form of notice under the applicable provision • • • was a discretionary matter with the court."

Even if in fact this case involved the Sale of the Debtor's principal asset without advertising it would not present a question requiring a decision by this Court. The power of the District Court under the statute is transparently clear. But not even squarely presenting the question attempted to be posed by Petitioner, it is respectfully submitted that Petitioner presents nothing for review here, and that the petition for a writ of certiorari should be denied.

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Attorney for Respondent.

APR 19 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 805

In the Matter of
MARATHON FOUNDRY & MACHINE COMPANY,
Debtor.

JACOB DYNER,
Petitioner,

—vs.—

JOSEPH SCHWARTZ and FRANCIS J. CURTIS, Trustees of MARATHON FOUNDRY & MACHINE COMPANY, and INTELBUYBON, INC.,
Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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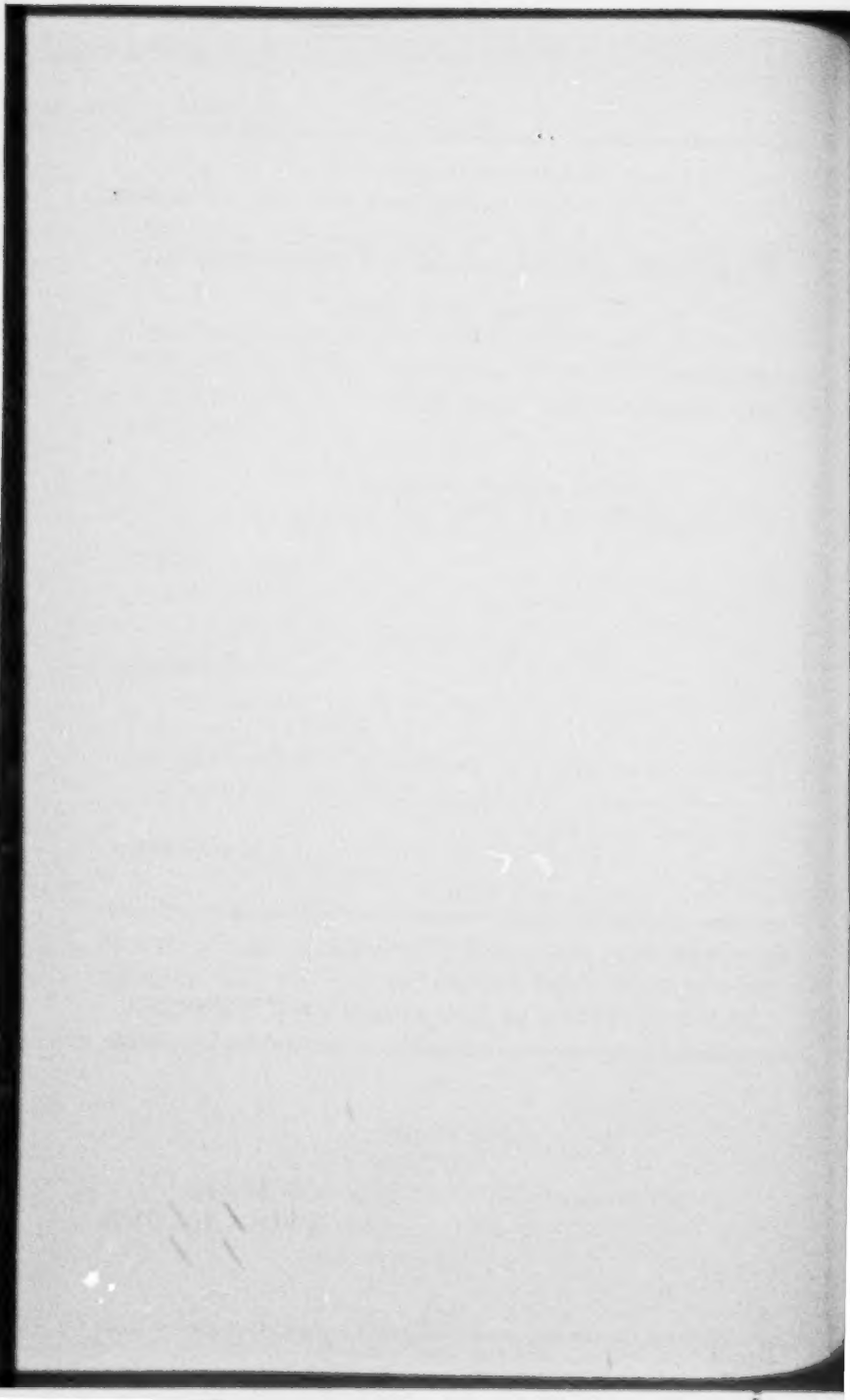

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IN THE

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Debtor.

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Petitioner,

—VS.—

JOSEPH SCHWARTZ and FRANCIS J. CURTIS, Trustees of MARATHON FOUNDRY & MACHINE COMPANY, and INTELECTRON, INC.,
Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jacob Dyner, petitioner *pro se herein*, prays a rehearing of his prior petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit, denied by this Court March 25, 1957. The basis thereof constitutes substantial grounds available to the petitioner, although not previously presented, to wit, the principal assets of the debtor in this Chapter X proceeding have been sold by the trustees under circumstances constituting either mis-

take, inadvertence or fraud. The order of the court below, which affirmed the District Court's refusal to hear the petitioner's petition herein, should be reversed so that the facts may be fully presented and this sale be set aside.

Opinions Below

The opinion of the Court of Appeals is reported in 239 Fed. 2d 122 and was set forth in Appendix A, attached to the original petition. That opinion affirmed an order entered without opinion by the United States District Court of Illinois, Eastern Division, overruling the objections of the petitioner to a Special Master's report which denied the petitioner the right to file a plan of reorganization and for other relief, including the setting aside of the foregoing sale, and which order of the District Court approved the said Master's report.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit, affirming the order of the said District Court, was dated November 29, 1956. The petition for writ of certiorari was duly filed in this Court and denied March 25, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1), and Rule 58 of the rules of this Court.

Questions Presented

1. Whether in a Chapter X proceeding under the National Bankruptcy Act the principal asset of the debtor or, in fact, any asset of the debtor, may be sold by the

trustees without revealing to prospective bidders at a public auction sale the fact that the successful bidder will become entitled to participate to the extent of some 70% in an existing claim against the debtor exceeding $200,000.00 so that they may bid appropriately and the rights of creditors and the estate be preserved; whether the failure to reveal said information to prospective bidders at such sale constitutes either mistake, inadvertence or fraud on the part of the trustees, requiring the sale to be set aside.

2. Whether the trustees herein in office for four years and liquidating the estate in piecemeal fashion are not acting contrary to the intent and purpose of Chapter X of the National Bankruptcy Act.

3. Whether the Court below in a Chapter X proceeding erred in affirming the District Court's refusal to permit the petitioner to submit his plan of reorganization which would pay creditors one hundred cents on the dollar and develop by testimony the bona fideness and validity of said plan.

Statutes Involved

The pertinent statutory provisions are 11 U. S. C., sections 501-676.

Statement of the Case

An involuntary petition in bankruptcy was filed against the debtor on April 30, 1953, at the instance, it is claimed, of the attorney for one of the large secured creditors, for the purpose of obtaining the assets (Case No. 11767—hereinafter referred to merely by number—R 262). The court denied petitioner's counsel the opportunity to submit such

proof (11767, R 262). On May 20, 1953, the debtor filed its petition for reorganization under Chapter X of the Bankruptcy Act, which petition was approved as having been filed in good faith, and the court appointed Joseph Schwartz and Francis J. Curtis as trustees. Although, by statute, the trustees were required, at the earliest practical date, to prepare and submit a statement of the property, liabilities and financial condition of the debtor and the desirability of the continuance thereof (11 U. S. C. §567, subd. 5), the record shows no such report until almost two years after their appointment. On April 30, 1955, they executed such report showing assets totalling $1,275,148.58, contingent assets of $343,486.54, claimed liabilities of $1,534,837.57, as against which they recommended allowed claims of $1,126,042.23, contingent claims of $75,000.00, liabilities of trustees $60,373.76, contingent liability of trustees $2,000.00, and monthly rentals being received of $6,250.00 per month on the plant of the debtor which the trustees had long since ceased to operate and had leased out to a tenant (11534*, R 99-102). Of these assets, $910,-129.58 represented the price bid for 32,126 shares of Bethlehem Foundry & Machine Co. (hereinafter referred to as "Bethlehem"), which were the subject matter of the contested sale herein (11534, R 99). Although the trustees recommended that the said sale of the shares of Bethlehem stock be consummated, and although the report disclosed that the trustees were not continuing a business other than collecting rents upon the plant which they had leased one year previously, they stated it was their opinion that it was to the best interest of the estate and creditors that the business of the debtor be continued (11534, R 101).

* Transcript filed with this Court, No. 725, October 1955 Term.

Six weeks previously and on March 14, 1955, the trustees had petitioned the court, stating that no plan of reorganization had been suggested and requesting that an order to show cause be issued why the aforesaid shares of Bethlehem stock held by the debtor should not be sold pursuant to a bid of $25.00 per share received by the trustees, and why service of the said order to show cause should not be made by mail to creditors and other parties in interest and by publication *twice* in the Wall Street Journal, Chicago edition (11534, R 7-10). On the same date, the Special Master approved and recommended such an order and the District Court signed the same, directing that a copy of the petition and order, without exhibits, be served upon creditors, the debtor, etc., and that publication of the *order* in the Wall Street Journal, Chicago edition, *once* be sufficient (11534, R 17).

The aforesaid shares of Bethlehem constituted over 71% of the issued and outstanding shares of stock of said corporation; a Pennsylvania corporation, which maintained its principal place of business in Bethlehem Pa. and on the appraiser's figures enjoyed net assets of $1,728,631.00, which, on the basis of 45,115 outstanding shares of capital stock, showed a book value of $38.32 per share (11534, R 39). While it did not pay regular dividends, its average yearly net earnings for five years past had been $3.47 per share (11534, R 39). In the year prior to the sale in question, it earned $397,000.00 before taxes, after depreciation, and $179,000.00 after taxes (11534, R 43, 44). It was not a listed stock and, being closely held, there was only one reported sale at $15.00 per share. The court-appointed appraiser testified, despite the conceded book value of $38.32 per share, that, in his opinion, the same had a value

of $24.14 a share or $775,521.64 for the block (11534, R 42). On cross-examination, this appraiser conceded that he had made no computation of the value of said stock to the debtor, considering that the debtor had a loss carry-over for Federal tax purposes of some $280,000.00. Similarly, he did not consider the tax disadvantage to the debtor arising out of a capital gain on the sale of the stock which had cost the debtor only $590,000.00 (11534, R 50).

The proposed sale of said stock was not advertised, no notice of sale was published in Pennsylvania, New York or Chicago, and the only publication was of the order to show cause once, as aforesaid, on March 18, 1955 in the Chicago edition of the Wall Street Journal. Although the return date noted in the published order to show cause was April 4, 1955, the sale was adjourned to April 25, 1955, with no further publication. On April 25, 1955, the Referee noted for the record that thirty persons were present. Actually however there were but three bidders present, namely, Metals Disintegrating Company, which had submitted the initial bid, a Mr. Harry Lebensfeld and a Mr. Maurice H. Kamm, who appeared on behalf of Intelectron, Inc., the successful bidder (11534, R 29, 30). The Master first placed on the stand George L. Weisbard, an attorney and accountant, who testified that he had appraised the stock, as aforesaid, based upon the figures previously alluded to, at $24.14 per share, following which disclosure the bidding took place only as between Messrs. Lebensfeld and Kamm, resulting in Mr. Kamm's offering $910,000.00, or $28.33 per share, and no higher bid being made (11534, R 32-64). At said hearing, the debtor opposed proceeding with the sale, as he did prior thereto by the filing of written objections, claiming that the sale would dispose of a prin-

cipal asset of the company and that such a sale should not take place in the absence of an emergency, except as part of a plan of reorganization, citing to the Master *Solar Manufacturing Corporation*, 176 F. 2d 493 (11534, R 73). The debtor further opposed proceeding with the sale, contending that it had a commitment for a loan of $975,000.00 from A. J. Armstrong Co., Inc., which would permit the proposal of a plan of reorganization to pay all creditors in full, that the sale of the principal asset of the debtor would make a reorganization impossible and would merely constitute a liquidation of the company, that the shares had a value in excess of the appraised value and the offered price to the debtor by virtue of the tax advantage to the debtor of its loss carry-over which would otherwise be lost, and that the consummation of the sale would result in a capital gain of from $350,000.00 to $400,000.00, which would result in a capital gains tax to the debtor (11534, R 105-107). The Referee overruled these objections. With respect to the perfectly proper remarks of counsel concerning the tax benefits which would be lost to the debtor by the sale (*Gregory* v. *Helvering*, 293 U. S. 465, 469, 55 Sup. Ct. 266, 267; *Jones* v. *Helvering*, 71 F. 2d 214, 217) the Master stated he would tolerate no discussion thereon as an attempt to "knock the United States out of taxes that it has coming" (11534, R 85). The Master thereafter recommended, and the District Court signed, an order on May 27, 1955, approving the aforesaid sale and directing that it be consummated, unless the debtor performed the impossible feat of depositing in cash by *May 20, 1955*, an amount to discharge all debts and administration expenses of the estate (although the trustees had not caused creditors to establish their claims, the discrepancy between claims filed

and those approved running to over $400,000.00), or to file with the trustees *on or before May 20, 1955* a plan of reorganization with a cash deposit to indemnify the estate, in the event Intelectron, Inc. withdrew its bid (although Intelectron had committed itself to leave its bid open until September 1, 1955) (11534, R 178). Although hearings were thereafter adjourned from date to date, and the debtor's time to file a plan extended, the Master expressed a complete disinterest in the proposals petitioner's counsel spoke of with respect to A. J. Armstrong Co. Inc. and disregarded counsel's statement with respect to the impossibility of putting up a cash deposit estimated at $134,000.00 as guaranty against loss of the Intelectron bid, despite the fact that said bid could not be withdrawn before September 1, 1955 (11534, R 158-160). Making no headway, the debtor filed notice of appeal from said order of May 27, 1955 and processed the same through the United States Court of Appeals for the Seventh Circuit (Case No. 11534), which court, however, chose to affirm the order of the District Court, stating that it would not interfere with the exercise of discretion vested in the lower court (228 F. 2d 594 (Dec. 20, 1955)). Certiorari was denied in this Court April 9, 1956 and the matter was referred back to the District Court.

In the District Court, on April 20, 1956, Mitchell Continental Corporation filed a petition offering to the trustees $1,006,507.58 for the Bethlehem shares (11767, R 59). At the hearing subsequently held thereon, said offerer complained that it had made its offer to the attorney for the trustees on February 1, 1956 and that, although almost three months had expired, the same had not been to the

court, whereupon it presented its own petition directly to the court (11767, R 76). Shortly thereafter, and on May 7, 1956, the petitioner, Jacob Dyner, who is the sole stockholder of the debtor corporation, moved the District Court for leave to file a petition wherein he set forth a plan of reorganization to pay the creditors one hundred cents on the dollar and which involved a proposed sale of the said stock of Bethlehem to Thompson-Starrett Company, Inc. of New York City, in exchange for 77,055 shares of their preferred stock and 37,367 shares of their common stock (traded on the American Stock Exchange), at a ratio of $15.00 and $5.00 per share, respectively, with appropriate increase or decrease depending upon the price at the time of consummation. The total amount thus to be realized would have been $1,342,660.00, in addition to which Thompson-Starrett Company, Inc. agreed to waive a claim which was now disclosed to be held by Bethlehem as against the debtor, the claim having been filed in the sum of $232,930.00, the trustees having recommended its allowance in the sum of $128,991.00 (11534), R 100). In addition, Thompson-Starrett Company, Inc. agreed to waive accumulated dividends on the stock of Bethlehem totalling $106,015.80. As evidence of good faith, there was issued a certified check of said company in the sum of $100,000.00 payable to the Clerk of the Court (11767, R 144) and, while there was some dispute as to authority to deposit the same, a telegram was received and marked in the record authorizing the deposit thereof (11767, R 156). Although the sale to Intelectron, Inc. had not been consummated and said corporation had merely kept on deposit its $50,000.00 good-faith money, and although the offer of the said corporation had not been unconditional and it had,

through various facets thereof, the right to withdraw, the District Court, on recommendation of the Master, refused to entertain the petition seeking to file this plan of reorganization, despite the tremendous disparity in the advantages that would inure to the creditors and the debtor, denied the application of Mitchell Continental Corporation and of the petitioner, and roundly castigated the petitioner and counsel for their "shocking" conduct in attempting to protect the rights of creditors and preserve the assets of the debor by making this application. No hearing was permitted, and an order denying the application was entered May 18, 1956. The petitioner appealed therefrom to the same Circuit Court which had heard the prior appeal (11767), and in said Court his counsel argued that the sale should have been set aside for inadequacy of price plus failure to adequately advertise. Limited to these considerations thus raised by counsel, the Circuit Court again affirmed, on November 29, 1956, as a mere second challenge of the same sale (239 F. 2d 122). New counsel petitioned this Court for writ of certiorari in March, 1957, on the sole issue that the District Court could not sell a principal asset without advertising the proposed sale, submitting a memorandum of six pages (plus appendix). Certiorari based on said sole ground was denied.

Vigorous opposition has been had throughout to these efforts of the debtor and the petitioner to extricate themselves from this morass of legal entanglement, and vigorous and lengthy briefs have been submitted in opposition at all stages by the purchaser, Intelectron, Inc., by Louis Dreyfuss, a secured creditor who, with two others, held the aforesaid stock of Bethlehem as security for a loan of

some $500,000.00 upon which they were being paid interest of at least 6% per annum, and by the attorney for the trustees. The court below paid great attention to the cogent argument of Mr. Dreyfuss to the effect that he had been stayed for a period of several years from realizing on his loan, it not having been brought to the court's attention, however, that, during said years, Mr. Dreyfuss had been dealing with the trustees, had advanced additional moneys to the trustees in business transactions involving this estate during the course of the administration thereof, had purchased a mortgage held upon the real estate of the debtor after the institution of the present proceedings, and was deeply involved in transactions involving this estate (11534, R 94, 96, 98).

Reasons for Granting the Writ

The Circuit Court, in affirming this "second attack" on this sale, held that gross inadequacy of price alone, or coupled with any other circumstances "absent fraud or mistake", would be insufficient to set aside the sale. What has not been presented to this Court on the prior petition for certiorari and which gives rise to this application for rehearing is the fact that the record shows the omission of a statement of material fact to bidders at a public auction, which either constitutes a mistake on the part of the trustees or, if done wilfully and intentionally, would constitute a fraud and therefore even under the language of the Circuit Court the sale must be set aside.

The record shows what transpired at the sale on April 25, 1955 which took place in response to the order to show cause (11534, R 29). The only notice of this proposed sale

that the interested financial public had was the one publication of an order to show cause on March 18, 1955 in the Chicago edition of the Wall Street Journal, directing certain secured creditors to show cause why they should not be directed to turn over the shares in question and why the shares should not be sold to Metals Disintegrating Company at $25.00 a share, or to such other bidder who made a higher or better bid. The petition and the exhibits thereto which set forth pertinent facts were not published. While thirty people appeared on the adjourned date of this order to show cause, which was adjourned without further advertising or published notice from April 4th to April 25th, 1955, only two actually bid. The bidder on whose behalf the order to show cause had presumably been obtained, made no comment and no further bid. The other unsuccessful bidder, Harry Lebensfeld, complained that he had not had the opportunity to look at the offer upon which the Master was predicating the bids (the exhibit attached to the bids—not published). He stated, "We would like to look at the offeror's agreement. If we are to be prepared to make a higher offer, we would like to know what basis—" (11534, R 58). " • • • I haven't read that whole offer" (R 61). A five-minute recess was taken, during which the technical and involved offer, containing five printed pages in the record, was made available (11534, R 11-14). After that recess and a subsequent five-minute recess, Mr. Lebensfeld made no further bid and the only outstanding bid was that of Intelectron (11534, R 64).

Actually, at that time, on April 25, 1955, when the public was invited to bid on the stock, there was no disclosure made by the appraiser who testified before the bidders opened their bids, or by the trustees, that Bethlehem had

filed a claim against the debtor for $232,930.00, that the trustees had recommended an allowance thereof to the extent of $128,991.00, and that the successful bidder, in acquiring the stock, would have as an ultimate offset against the amount paid by him a recovery in the estate on this claim to the extent that creditors received dividends. It is respectfully submitted herein that the failure to disclose this information to bidders constituted either mistake on the part of the court-appointed appraiser and on the part of the trustees or, if done intentionally and wilfully, constituted actual fraud. If a bidder knew that he would gain the benefit of such an ultimate offset to the extent that he was acquiring over 70% of Bethlehem and would thereby ultimately be the recipient of 70% of the dividend to creditors paid to Bethelehem, he could appropriately increase his offered price. If he didn't have that information, then he would be coming into a "windfall" at the expense of the creditors and the estate. The failure to so inform bidders deprived the creditors and the estate of the best bids that could have been made.

Further than the foregoing proposition, if the successful bidder had the information and other prospective bidders did not, then the mistake or fraud is aggravated a thousandfold for, in that case, the successful bidder had the advantage of being able to present his bid knowing that he would be the ultimate recipient of a substantial abatement, whereas the unsuccessful bidder was not armed with that information. The record in this case shows beyond equivocation that the successful bidder had such information. At one point in these proceedings, Interlectron offered to increase its bid to the extent of $187,000.00, by actually increasing its bid $100,000.00 and by waiving divi-

dends which had accrued upon the Bethlehem stock. It might be noted, incidentally, that this $187,000.00 has been blithely waived and the creditors not given the benefit thereof, the Master gratuitously refusing to accept the same on behalf of the estate, despite its voluntary offer (11767, R 194). Nevertheless, in an effort to explain the same away to the court which was hearing the objections to the proposed consummation of this sale, as recommended by the Master, counsel for the trustees tried to rationalize why Interlectron had voluntarily offered to increase its bid and stated:

> "The other matter on the increase of the bid of $100,000 arose out of the normal discussion that the trustees were confronted with in the problem involving a claim that Bethlehem Foundry had against Marathon. That claim was filed for two hundred thirty and some-odd thousand dollars. If Intelectron acquires the property, the stock, they would become the owners of that claim also. * * *
>
> Mr. Bolotin (Counsel for Intelectron) the trustees and myself requested that that claim be reduced to a minimum amount. * * * We never arrived at any definite figure on it but it was discussed and as a matter of discussion the figure of the value of the claim on various hypotheses was discussed around $100,000.
>
> Now, I can't go into the mental processes of the bidder here, but evidently with the discussion that Mr. Bolotin had with the trustees and with me he felt that it might have some persuasive force if he offered to increase his bid by $100,000" (11767, R 249, 250).

Mr. Bolotin was an attorney who appeared for Intelectron at said hearing, heard the foregoing comments and

made no disclaimer thereof. It is clear, therefore, that Intelectron had knowledge of this claim which they would become entitled to participate in, as successful bidders, and it is clear from the record that such knowledge was not given to those present at the sale nor placed in the notice of sale. The withholding of such information, in its best light, constituted a mistake; in its worst light, if done intentionally, fraud. In the District Court, this specific charge of mistake or consequent fraud was made, despite its being made in open court, not one word was presented in answer thereto. In the record (11767, R 231), we find the following statement by counsel for the petitioner in open court in the presence of counsel for the trustees and for Intelectron:

> "In the offer to sell this stock, if the Court please, there was a claim that Bethlehem Foundry had against Marathon in the sum of $200,000 and on which it would be entitled to a dividend the same as any other unsecured creditors. Nobody was apprised of that claim. No bidders were apprised of that claim. No consideration was given to it in the appraisement. It was clearly overlooked. I think that is the best that we can say for it, that somebody forgot about it. At any rate, no consideration was given to it."

Under the settled authorities conceded by the Court below a sale should be set aside under circumstances of fraud or mistake. *Graffan* v. *Burgess,* 117 U. S. 180, 191, 192; *Webster* v. *Barnes Banking Co.,* 113 F. 2d 1003, 1005; *Jewett & Sowers Oil Co.,* 86 F. 2d 497, 498.

It is clear that the suppression of a material fact or a partial and fragmentary disclosure would constitute a

fraud just as much as an actual misrepresentation of fact. *Equitable Life Insurance Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410, 425, 61 Sup. Ct. 623, 630; *Stewart* v. *Wyoming Cattle Ranch*, 128 U. S. 383, 388, 9 Sup. Ct. 101, 103. Based on the foregoing, it is respectfully submitted the instant sale must be set aside.

Passing to petitioner's additional propositions this Court has held that Congress did not intend that resort be had to Chapter X for the mere purpose of liquidation. *Fidelity Assurance Association* v. *Sims*, 318 U. S. 608, 621, 63 Sup. Ct. 807, 813. In the case at bar, the trustees have, by a process of attrition, successively sold off the assets of the debtor to the point where they are presently reduced only to a parcel of realty leased out to a tenant. No operation of a business has been continued, no effort has been made to continue a business, and the successive sale of assets, it is submitted, merely constitutes a perpetuation of a trusteeship for its own purposes, liquidating the assets of the debtor over the debtor's objection, contrary to the intent of Congress, contrary to law and contrary to the creditor's interests. This point was made by the petitioner and the debtor in opposing, with all possible vigor at its command, the proposed sale of the shares of stock, the actual sale and the consummation thereof. It is pertinent to note that, contrary to the impression otherwise sought to be created, counsel for unsecured creditors likewise joined in the petition to reconsider the matter and permit other proposals to be made which would give the creditors a better return (11767, R 109). Similarly, it is well to dispell the point sought to be raised that this is in the nature of a "Johnny-come-lately" proposal created by some illusory increase in value of the Bethlehem stock.

Counsel for Intelectron admitted on the record that the stock has no greater value today than as the date of its bid (11767, R 254). The position of the debtor has been a consistent one of attempting to obtain a hearing on a proposed plan of reorganization which would allow one hundred cents on the dollar to creditors and preserve an equity for the sole stockholder. The only complaint that might legitimately be made against the petitioner is that it took him several years before he came up with a proposal. However, in view of the trustees' handling of this matter, the uncertainty with respect to claims and the cessation of operations, leasing of the plant and sale of assets, even before the litigated proposed sale, it is understandable how a debtor which is petitioned into involuntary bankruptcy and which obviously has great financial problems can find it difficult for a long period of time to come up with a reasonably acceptable plan of reorganization. If there was any legitimate complaint on the part of the trustees during this two-year interval before a plan was proposed, the trustees had ample opportunity to request a liquidation in bankruptcy. The trustees, who were charged with the obligation under the statute of preparing and submitting a plan, chose to sit by, and when a plan was ultimately proposed by the debtor spent all their energies in flaying the debtor and the petitioner and decrying and belittling the proposed plan to the point where the court below did not even grant a hearing. Whatever the petitioner has done has been motivated solely by a desire to preserve his investment in a very substantial company, and his efforts were likewise directed toward 100% payment to creditors. It is respectfully submitted that such actions so directed are not "shocking" and,

indeed, the adjective may be well applied to the activities on the other side of the picture.

In the interest of substantial justice, it is respectfully submitted that in this Court of last resort this case should be opened, so that the facts, whatever they may be, may be fully aired and so that these contentions which involve mistake or fraud on the part of Court appointed trustees handling millions which do not belong to them may have their day in court. If this offer, as submitted by the petitioner in the District Court, supported by a certified $100,000.00 check of Thompson-Starrett Co., Inc., a recognized nationwide company, was a "gold brick", as characterized by the Circuit Court, certainly that could not appear without at least the opportunity of a trial and hearing. No such opportunity was afforded. The petitioner asks of this Court an opportunity to be heard before his lifetime investment and the rights of unsecured creditors be permanently destroyed.

WHEREFORE, it is respectfully prayed that the Court grant certiorari to the Circuit Court of the Seventh Circuit, certifying the questions as herein presented.

Respectfully submitted,

JACOB DYNER,
Petitioner Pro Se.

Certificate

The undersigned, JACOB DYNER, Petitioner Pro Se, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 as amended, and that said petition for rehearing is not interposed for delay.

JACOB DYNER,
Petitioner Pro Se.